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No. 97-136

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

MARY JOY ANN GUSTILO and
JOSE VICENTE GUSTILO, III,

Petitioners,

v.

NADINA (MARAVILLA) GUSTILO, Individually and as Former Administratrix of The Estate of Armando C. Gustilo, Deceased, and as Guardian of June Salvacion (Maravilla) Gustilo; JOSEPH S. HORRIGAN, as Guardian Ad Litem and Attorney Ad Litem of June Salvacion Gustilo; and the KANALY TRUST COMPANY, as Administrator of the Estate of Armando C. Gustilo, Deceased,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Fourteenth Judicial District Of Texas At Houston

BRIEF OF RESPONDENT JOSEPH S. HORRIGAN, ATTORNEY AD LITEM FOR JUNE S. GUSTILO, IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

A. IS A FEDERAL QUESTION PRESENTED WHEN PETITIONERS' CRITICISM OF A 1985 PHILIPPINE COURT ORDER CONSTITUTES A COLLATERAL ATTACK ON THAT 1985 ORDER?

B. IS A FEDERAL QUESTION PRESENTED WHEN TEXAS COURTS HAVE VALID REASONS UNDER TEXAS LAW FOR DECLINING TO GIVE PRECLUSIVE EFFECT TO A JUDGMENT BY A PHILIPPINE APPELLATE COURT?

C. IS A FEDERAL QUESTION PRESENTED WHERE A TEXAS APPELLATE COURT'S REFUSAL TO ADDRESS THE ALLEGED MERITS OF AN ASSIGNMENT OF ERROR IN PETITIONERS' BRIEF TO THAT COURT IS BASED UPON ESTABLISHED TEXAS LAW THAT AN APPELLATE COURT MAY DISREGARD AN ASSIGNMENT OF ERROR WHICH IS MULTIFARIOUS?

D. ASSUMING *ARGUENDO* THAT ONE OR MORE FEDERAL QUESTIONS HAVE NOW BEEN PROPERLY FRAMED, DOES THIS COURT HAVE JURISDICTION TO EXERCISE ITS APPELLATE POWER OVER STATE COURT JUDGMENTS, WHERE THE FEDERAL QUESTIONS WERE NEITHER PRESERVED NOR DECIDED IN THE STATE COURTS?

E. ASSUMING *ARGUENDO* THAT ONE OR MORE FEDERAL QUESTIONS WERE PROPERLY PRESERVED OR DECIDED IN THE STATE COURTS, DOES THIS COURT HAVE JURISDICTION TO REVIEW THE CASE WHERE THE STATE COURT JUDGMENTS REST UPON INDEPENDENT STATE LAW GROUNDS?

LIST OF PARTIES

The parties to the proceeding below set forth in the caption are as follows:

1. Mary Joy Ann Gustilo
2. Jose Vicente Gustilo, III
3. Nadina Maravilla Gustilo
4. Joseph S. Horrigan
5. June Salvacion Gustilo
6. Kanaly Trust Company

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I.

MISSTATEMENTS BY PETITIONERS

In their Petition for a Writ of Certiorari, the Petitioners make misstatements of fact, or misstatements of fact and law, which should be called to the attention of the Court. Such misstatements include the following:

1. Petitioners reproduce, as Appendix HH to their Petition, a partial summary judgment in heirship proceeding signed by the Texas trial court on June 1, 1992. In the body of their Petition, at pages 12, 17 and 28, Petitioners continually state that the trial court based its partial summary judgment that June S. Gustilo was a daughter and heir of Armando Gustilo upon Section 12.02 of the Texas Family Code. Petitioners then argue that Philippine law, rather than the Texas Family Code, should have been applied by the Texas trial judge in making such a determination. Petitioners have ignored the fact that the partial summary judgment of June 1, 1992 was later superseded by a second partial summary judgment by the same trial judge, signed on June 8, 1993. That second partial summary judgment, which is set forth in its entirety in Appendix I to this Brief, makes no reference to Section 12.02 of the Texas Family Code. When the partial summary judgment of June 1, 1992 was signed, it was based upon the premise that Armando Gustilo, the Decedent, was a domiciliary of Texas. Thereafter, on December 10, 1992, the probate court found Armando Gustilo to have been a Philippine domiciliary (See Petition, page 11). This fact necessitated a second motion for partial summary judgment by June Gustilo, resulting in the partial summary judgment of June 8, 1993 (Appendix I to this

Brief), in which no mention is made of Section 12.02 of the Texas Family Code.

2. On page 6 of their Petition, Petitioners declare that they "seek to retain titles to properties that devolved to them under Philippine law from their deceased father, Armando Gustilo . . . ". In making that statement, Petitioners ignore the fact that the jury in this case found that they had waived and released their rights to inherit from the Decedent, when they received cash and property in 1988 having a combined total value in excess of $1.3 million. (Texas court of appeals Opinion, Appendix D to Petition, at page A-6).

II.

RESPONDENT'S STATEMENT OF THE CASE

Respondent Horrigan, as Attorney Ad Litem for June S. Gustilo, adopts the factual statements set forth in the opinion of the Texas court of appeals, set forth in Appendix D to the Petition, as his own statement of the case.

III.

REASONS FOR DENYING THE WRIT

A. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHEN PETITIONERS' CRITICISM OF A 1985 PHILIPPINE COURT ORDER CONSTITUTES A COLLATERAL ATTACK ON THAT 1985 ORDER.

B. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHEN TEXAS COURTS HAD VALID REASONS UNDER TEXAS LAW FOR DECLINING TO GIVE

PRECLUSIVE EFFECT TO A JUDGMENT BY PHILIPPINE APPELLATE COURT.

C. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHERE A TEXAS APPELLATE COURT DECLINED TO ADDRESS THE ALLEGED MERITS OF AN ASSIGNMENT OF ERROR IN PETITIONERS' BRIEF TO THAT COURT ON THE GROUND THAT THE ASSIGNMENT OF ERROR WAS MULTIFARIOUS.

D. ANY FEDERAL QUESTIONS NOW RAISED BY PETITIONERS WERE NEITHER PRESERVED NOR DECIDED IN THE STATE COURTS AND, ACCORDINGLY, THIS COURT'S JURISDICTION MAY NOT NOW BE INVOKED.

E. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THIS CASE WHERE THE STATE COURT JUDGMENTS REST UPON INDEPENDENT STATE LAW GROUNDS.

IV.

ARGUMENTS AND AUTHORITIES

A. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHEN PETITIONERS' CRITICISM OF A 1985 PHILIPPINE COURT ORDER CONSTITUTES A COLLATERAL ATTACK ON THAT 1985 ORDER.

Petitioners seek to invoke this Court's jurisdiction by arguing in their Petition that the Texas courts "refused to give credit and effect to Philippine statutory and case authority . . . ". (Petition, page 3). This argument, to the extent it affects the status of June S. Gustilo as a daughter and heir of Armando Gustilo, appears to be based on the

premise that a 1985 order by a Philippine trial judge, which declared June S. Gustilo to be the daughter of Armando Gustilo and ordered June's birth certificate changed to reflect that fact, was contrary to Philippine law. This argument is nothing more than an effort to collaterally attack a final judgment of a Philippine court, signed twelve (12) years ago.

As the Texas court of appeals pointed out in its opinion, a Philippine trial court signed an order in 1985 which found Armando C. Gustilo to be the father of June Salvacion Gustilo, and which directed the Civil Registrar in Manila to correct the child's birth certificate so that her surname would be changed from "Maravilla" to "Gustilo", and so that her father would be reflected on the corrected birth certificate to be Armando C. Gustilo (Texas court of appeals Opinion, Appendix D, pages A-17 through A-19). This 1985 Philippine Court Order, which was not appealed and which was, therefore, a *final* judgment under any definition, was one of several documents submitted to the probate court by June Gustilo in support of her second motion for partial summary judgment.

In affirming the probate court's partial summary judgment declaring June S. Gustilo to be a daughter and heir of the Decedent, the Texas court of appeals found it unnecessary to consider any summary judgment evidence submitted by June Gustilo except the 1985 Philippine final order, finding that "the order of the Philippine trial court standing alone was sufficient to establish that June is the child and heir of Gustilo as a matter of law." (Texas court of appeals Opinion, Appendix D, page A-17).

The arguments by Petitioners that the 1985 order was rendered "ex parte" and that it conflicts with Philippine law are not only factually inaccurate but are entirely misplaced. Relevant portions of the 1985 order are set forth in the Opinion of the Texas court of appeals. It is recited in that order that **"proper notice"** of the proceeding had been given "to the Office of the Solicitor General, the Local Civil Registrar of Makati, Metro Manila, as well as **respondents Francisco J. Maravilla and Armando C. Gustilo** . . . " (Texas court of appeals Opinion, Appendix D, page A-17). Petitioners' contention that June S. Gustilo was not represented before the Philippine trial court begs the question; only June S. Gustilo has standing to complain about any lack of representation when she was found to be Armando Gustilo's child in 1985. June, who is now an adult, not only did not raise such a complaint in the Texas probate court but, through her attorney ad litem, she urged that the 1985 order established, as a matter of law, that she was the child of Armando Gustilo.

Furthermore, as the Texas court of appeals emphasized in its opinion, Petitioners never contended in the Texas courts that the Philippine trial court lacked jurisdiction when it issued its 1985 order. Therefore, as the Texas court of appeals correctly held, Petitioners' attempt to collaterally attack that 1985 order must necessarily fail. "A collateral attack is an attempt to avoid the effect of a judgment in a proceeding brought for some other purpose." *Employers Casualty Co. v. Block*, 744 S.W.2d 940, 943 (Tex. 1988). The effect of that Philippine order was a finding by a court with jurisdiction that June Gustilo was

the biological child of Armando Gustilo. The instant lawsuit, which was initiated by the Petitioners, was a "proceeding brought for some other purpose." *Id.* at 943. Its purpose was to obtain a determination of all of the heirs of Armando Gustilo by a Texas court and to attempt to set aside the settlements made by the Petitioners in the Philippines. The Texas proceeding was not, however, an opportunity to relitigate the finding that Armando Gustilo was the father of June Gustilo.

For Petitioners to successfully collaterally attack the 1985 Philippine judgment, it was incumbent on them to show that the judgment was absolutely void, the court being without jurisdiction. *See Ex parte Tyler*, 261 S.W.2d 833 (Tex. 1953) (collateral attack must show judgment absolutely void, not merely voidable, rendered by a court without jurisdiction of the parties and of the subject matter). Even if the decision was erroneous, or rendered in disregard of procedural statutory requirements, it cannot be successfully attacked collaterally. *See Brazzel v. Murray*, 481 S.W.2d 801 (Tex. 1972).

Nowhere in the Texas courts did the Petitioners contend that the Philippine court did not have jurisdiction over the parties to that proceeding (Nadina Gustilo, Francisco Maravilla, and Armando Gustilo) when the 1985 order was signed, and nowhere did the Petitioners contend that the Philippine court lacked jurisdiction over the subject matter of the suit. Upon introduction of an authenticated copy of the 1985 order in the Texas case, June Gustilo made a prima facie case as to its validity, including jurisdiction, and the burden shifted to the Petitioners to prove a valid basis for collateral attack. *See Minuteman Press Int'l v. Sparks*, 782 S.W.2d 339 (Tex. App. – Fort Worth

1989, no writ). Petitioners not only failed this burden, but made no effort to carry it. Procedural attacks, which might render a judgment voidable but not void, are of no consequence. In effect, what Petitioners attempted to do was to bring an impermissible direct attack, relitigating the 1985 Philippine decision, in a collateral proceeding.

Petitioners' contention that *their* "due process" rights (See Petition, page 24) were somehow violated by the Texas courts' refusal to go behind the 1985 Philippine court order ignores the indisputable fact that the 1985 order was entered during the lifetime of Armando Gustilo, and that Armando Gustilo was not only a party to that proceeding, but was given notice of the proceeding, made an appearance therein, and concurred in the judgment. As heirs-at-law of Armando Gustilo, Petitioners are therefore bound by the effect of that judgment. It is well-settled in Texas that a judgment which affects an ancestor is conclusive on his heirs-at-law. *Berry v. Humble Oil & Refining Co.*, 205 S.W.2d 376 (Tex. Civ. App. – Waco 1947, writ ref'd n.r.e.); *Ray v. Chisum*, 260 S.W.2d 118, 124 (Tex. Civ. App. – Texarkana 1953, writ ref'd n.r.e.). Obviously, during Armando Gustilo's lifetime, the Petitioners (as children of Armando Gustilo) would have had no standing to complain when Armando Gustilo chose to acknowledge his paternity of another child.

There is no federal question with respect to this issue, and this Court has no jurisdiction to consider it.

B. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHEN TEXAS COURTS HAD VALID REASONS UNDER TEXAS LAW FOR DECLINING TO GIVE PRECLUSIVE EFFECT TO A JUDGMENT BY PHILIPPINE APPELLATE COURT.

Throughout their Petition, Petitioners urge that comity required the Texas courts to give preclusive effect to an opinion by a Philippine appellate court, styled Gustilo v. Agdamag, which decision was later affirmed by the Supreme Court of the Philippines. Petitioners argue that there is "supreme federal law" (Petition, page 18), which required the Texas courts to be bound by the Philippine appellate court decision, and that the Texas courts acted capriciously in declining to extend comity to the Philippine opinion.

The Texas court of appeals dealt extensively with the judgment of the Philippine appellate court. See Texas court of appeals Opinion, Appendix D, pages A-21 through A-24. In declining to give that opinion preclusive effect, the Texas courts were on sound legal ground.

First of all, the only issue addressed by the Philippine court of appeals in its opinion was the issue of the validity or invalidity of the compromise agreements signed by Petitioners in the Philippines. In the instant case, there were a great many other issues before the probate court. Among those issues was the question of whether the Petitioners were barred from recovery under the doctrines of waiver and release, and also under the doctrine of quasi-estoppel. In this regard, it should be emphasized that, in addition to signing the compromise agreements, Petitioners also signed additional documents entitled

"Waiver, Renunciation and/or Repudiation of Inheritance." The jury in the instant case found that the Petitioners had released *and* waived any further claims to the Gustilo estate, and the jury also found that Petitioners' own conduct precluded them from any further recovery in the estate under the doctrine of quasi-estoppel. Petitioners have never asserted that there was any error relating to these jury findings. Thus, even if the holding of the Philippine appellate court that the compromise agreements themselves were void was given effect by a Texas court, there was still ample basis to affirm the trial court's judgment on issues other than the validity or invalidity of the compromise agreements.

In addition, the opinion of the Texas court of appeals clearly demonstrates why comity should not be applied in this case. As the Texas court of appeals reasoned, Petitioners' attempt to give the Philippine appellate court opinion preclusive effect in Texas was nothing more than "an attempt to have two bites at the same apple." (Texas court of appeals Opinion, Appendix D, page A-23 at footnote 6). In rejecting Petitioners' arguments, the Texas court of appeals pointed out:

> "Initially, appellants [Petitioners] lost their argument concerning the compromise agreements in the Philippine court. While that case was under reconsideration in the Philippines, they filed suit in Houston essentially making the same claim: The compromise agreements were void because of the fraudulent actions of Nadina. When they learned their argument had been accepted by the Philippine appellate court, they attempted to use that decision in the Houston court. Now, unhappy with the outcome of their

> case in Houston, they want to rely on the Philippine court's decision. Appellants had the option of not filing suit in Houston, or filing for a stay under Section 36.007 of the Texas Civil Practice and Remedies Code. They chose neither avenue and cannot now complain because they did not prevail in Texas." (Texas court of appeals Opinion, Appendix D, page 23, footnote 6).

The above conduct by the Petitioners, as illustrated by the above language from the Texas court of appeals opinion, is a graphic example of why Texas courts have continued to uniformly hold that comity is not a matter of right but is voluntary and rests in the sound discretion of the tribunal of the forum. *See Nowell v. Nowell*, 408 S.W.2d 550, error dismissed, *cert. denied*, 88 S.Ct. 53, 389 U.S. 847, 19 L.Ed.2d 116; *Interfirst Bank – Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864 (Tex. App. – Houston [1st Dist.] 1985, error ref'd n.r.e.); *Gunter v. Glasgow*, 608 S.W.2d 273 (Tex. Civ. App. – Eastland 1980, no writ). In pointing out that Petitioners were seeking to have "two bites at the same apple", the Texas court of appeals was not only recognizing that comity is a matter for the sound discretion of a Texas trial judge, but following the principle, long established in Texas, that a party may, by his conduct, estop himself from invoking the benefits of the doctrine of res judicata (or, in the instant case, applying res judicata effect to a judgment of a foreign country, under the principle of comity). Among the Texas cases which hold that a party's actions and arguments during the course of litigation can cause him to be estopped from asserting res judicata are the following: *Sutherland v. Cobern*, 843 S.W.2d 127, 131 (Tex. App. – Texarkana 1992,

writ denied); and *Bethel v. Norman Furniture Co., Inc.*, 756 S.W.2d 6, 8 (Tex. App. – Houston [1st Dist.] 1988, no writ).

Once again, the Texas courts' rejections of Petitioners' contention on this issue were based on established Texas law, and no issue arising under the Federal Constitution is involved. Therefore, this Court is without jurisdiction to consider Petitioners' argument on this point.

C. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHERE A TEXAS APPELLATE COURT DECLINED TO ADDRESS THE ALLEGED MERITS OF AN ASSIGNMENT OF ERROR IN PETITIONERS' BRIEF TO THAT COURT ON THE GROUND THAT THE ASSIGNMENT OF ERROR WAS MULTIFARIOUS.

Petitioners next effort to invoke this Court's jurisdiction stems from a virtually unintelligible point of error which was contained in their brief to the Texas court of appeals. An excerpt from that point of error, entitled "Sixth Point of Error", is found in Appendix CC to Petitioners' brief, at pages A-115 through A-117.

As pointed out by the Texas court of appeals in its opinion, the "point of error" was in reality multiple subpoints, ranging from complaints about discovery and discovery sanctions to alleged errors in the jury charge. (Texas court of appeals Opinion, Appendix D, at A-26).

Faced with the content of the sixth point of error, which obviously attacked numerous unrelated rulings of the trial court in a "shot-gun" approach, the Texas court

of appeals followed well established Texas law in declaring the point of error to be multifarious and, therefore, disregarding it. The Texas court of appeals also stated: "This 'point of error' does not sufficiently direct the attention of the court to the error about which the complaint is made; nor are these numerous alleged errors supported by sufficient argument. *See Tex. R. App. P.* 74(d)." (Texas court of appeals Opinion, Appendix D, at A-27.)

Petitioners now contend that: (a) the Texas court of appeals violated Rule 90(a), Tex. R. App. P. in disregarding the sixth point of error; and (b) the alleged failure to follow Rule 90(a) somehow constitutes a violation of Petitioners' due process rights. (Petition, at page 24).

Any appellate court must have procedural rules to govern the form and clarity of briefs filed with that court. The Texas law on this subject is substantially the same as this Court has expressed in Rule 14.4:

> "The failure of a petitioner to present with accuracy, brevity and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." Sup. Ct. R. 14.4

In Texas, as in other jurisdictions, the policy behind such briefing rules is obvious. A good expression of the Texas policy is found in *Rio Delta Land Co. v. Johnson*, 566 S.W.2d 710, 713-714 (Tex. Civ. App. – Corpus Christi 1978, no writ):

> "This Court, in *Leal v. Aluminum Company of America*, 443 S.W.2d 942, 945-946 (Tex. Civ. App. – Corpus Christi 1969, no writ), speaking through Justice Nye, now Chief Justice, said:

> 'There must be a substantial compliance with the provisions of the briefing rules in order for a litigant to have his points of error considered by the appellate court. Although the rules are to be given a liberal construction to the end that a just, fair, equitable and impartial adjudication of the rights of the parties may be obtained, a sufficient compliance with the rules is necessary to justify consideration of the point of error. This has been made mandatory by our Supreme Court. *Wagner v. Foster*, 161 Tex. 333, 341 S.W.2d 887 (1960) . . . '

A point of error is multifarious if it embraces more than one specific ground of error, or if it attacks several distinct and separate rulings of the trial court [citations omitted].

It has long been the policy of this Court to indulge a liberal construction of the briefing rules in favor of the sufficiency of the brief, and to give effect thereto if we, from an examination of the statement under each point (or grouped points), can determine with some degree of certainty the nature of the complaint raised by the point. Here, there is no such statement. In order to properly dispose of the points as here presented, we would have to brief each of the challenged findings, many of which are completely independent of other findings which are complained of in the appeal. Without the benefit of a statement to assist us, the task would be enormous. No such liberality of construction is contemplated by the briefing rules.

In the instant case, the points are multifarious and will not be considered since each point attacks several separate and distinct findings of

> fact, and in some instances, separate and distinct conclusions of law."

Id. at 713-714.

A cursory examination of Petitioners' sixth point of error in the Texas court of appeals reveals that the multiple sub-points contained therein are precisely the kind of briefing abuse that the court rejected in *Rio Delta Land Co. v. Johnson, supra.* Petitioners failed to comply with standard briefing rules developed for the Texas appellate court system. Obviously, this Court need only compare its own rules with the briefing rules in Texas to conclude that no federal question is present with respect to this issue.

D. ANY FEDERAL QUESTIONS NOW RAISED BY PETITIONERS WERE NEITHER PRESERVED NOR DECIDED IN THE STATE COURTS AND, ACCORDINGLY, THIS COURT'S JURISDICTION MAY NOT NOW BE INVOKED.

Throughout their Brief, Petitioners allege that issues governed by the "supreme law of the land" were ignored by the Texas state courts during the trial and appeal process ultimately leading to the denial of their application for writ of error by the Supreme Court of Texas. The very basic problem with this argument is that Petitioners did not adequately raise and preserve, in the Texas courts, the alleged "federal questions" which they now seek to have this Court examine. Rule 14.1(g)(i) of the Rules of the Supreme Court of the United States clearly places the burden upon the Petitioners to specify in their statement of the case "the stage in the proceedings, both in the court of first instance and in the appellate courts,

when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts . . . " Sup. Ct. R. 14.1(g)(i).

The burden imposed upon the Petitioners under the above rule is a high one, and a party seeking to invoke this Court's jurisdiction must show that the federal question was in fact properly raised, so that the state court's failure to deal with it was not for want of proper presentation. This Court has stated numerous times that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969); and *See Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983).

The only statements in the Petition where Petitioners apparently seek to discharge the high burden referred to above are found at pages 10 through 16 of the Petition, where Petitioners state that "[f]oreign law was urged in numerous motions – all denied without resulting showing that any of such law was ever applied in this case . . . ". Petitioners then refer this Court to Appendices EE and FF which accompany their Petition. Appendix EE purports to show the "places where probate court was advised of foreign law" (Appendix, EE, page A-119), and Appendix FF purports to be an index of "foreign authority" filed in the Texas court of appeals.

The obvious flaw in Petitioners' references to "foreign law" as a means of invoking this Court's jurisdiction is that references to "foreign law" are not references to

federal constitutional issues. Even where the references to foreign law might be accompanied by vague references to due process violations, this Court's jurisdiction under 28 U.S.C. Section 1257(a) has not been properly invoked. In this regard, the instant case is similar to *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), where the size of a punitive damage award, sustained by the Mississippi Supreme Court, was at issue. In *Crenshaw*, this Court pointed out "that appellant's petition for rehearing alleged only that the punitive damages award 'was clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles' . . . The vague appeal to constitutional principles does not preserve appellant's Contract Clause or due process claim." *Id.* at 77-78.

In the instant case, Petitioners did not properly raise any federal constitutional issues at any stage of the proceeding, until after the Supreme Court of Texas had denied the application for writ of error to that court.[1] The first time that Petitioners raised their constitutional argument under the supremacy clause of the U. S. Constitution was in their motion for rehearing to the Supreme Court of Texas. This Court has held that raising a federal question for the first time in a petition for rehearing

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[1] A vague reference to Petitioners' "due process" rights was raised in Petitioners' brief to the Texas court of appeals in their discussion of the proceedings leading to the 1985 Philippine trial court order. See page 7 of this Brief. Even this reference was not raised in the motion for rehearing to the Texas court of appeals. Therefore, under Texas procedural rules, the issue is deemed to have been waived and not properly preserved. Tex. R. App. P. 131(e).

addressed to the highest state court is insufficient unless that court actually entertains the petition and expressly decides the question. *Radio Station WOW v. Johnson*, 3826 U.S. 120, 128 (1945). In the instant case, the record reflects that the Supreme Court of Texas did not entertain or decide the alleged constitutional issues now urged by Petitioners. The Supreme Court of Texas simply denied the application for writ of error summarily, with the notation "writ denied." *See* Appendix C, page A-4, to Petition). Thus, under the rules of this Court and the established case law emanating from this Court, Petitioners' efforts to now invoke this Court's jurisdiction must fail, because the alleged federal questions now raised by Petitioners were neither preserved nor decided in the state courts.

E. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THIS CASE WHERE THE STATE COURT JUDGMENTS REST UPON INDEPENDENT STATE LAW GROUNDS.

Respondent Horrigan submits that his argument and authorities set forth above, coupled with the opinion of the Texas court of appeals, conclusively demonstrate that this controversy turns solely on questions of Texas law. While it is true that the effect (if any) to be given to an intermediate Philippine appellate court has been an issue in the case, the Texas courts were on sound procedural and substantive ground, under Texas law, in not permitting that opinion to control the outcome of the case, given the facts of this case and the conduct of the Petitioners themselves. It is also significant that the Texas court of appeals, in its opinion stated: "We have reviewed the law

from each jurisdiction potentially involved in this case and find our conclusion that the evidence was sufficient to support the jury's finding is correct under Texas, New Jersey, or Philippine law." (Appendix D, page A-15, footnote 4). Because the state grounds on which this case was decided are both independent and adequate to support the judgment, it is further submitted that this Court should not assume jurisdiction in this case. This Court so held in *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

CONCLUSION

Respondent Horrigan respectfully submits that this Court has no jurisdiction in this matter because no substantial federal question is involved, and moves for dismissal on that basis. In the alternative, he requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX I 1i

APPENDIX I

NO. 214,659

ESTATE OF	§	IN THE PROBATE COURT
ARMANDO C. GUSTILO,	§	NUMBER ONE (1) OF
DECEASED	§	HARRIS COUNTY, TEXAS

SECOND PARTIAL SUMMARY JUDGMENT IN HEIRSHIP PROCEEDING

BE IT REMEMBERED that on April 5, 1993, the Court heard the Second Motion for Partial Summary Judgment in Heirship Proceeding filed in this cause by June Salvacion Gustilo, a Minor, by and through her duly appointed attorney ad litem. The parties appeared by and through their respective counsel. The Court examined the pleadings, the Second Motion for Partial Summary Judgment, the responses thereto, and the summary judgment evidence, including the admissions, affidavits and authenticated or certified public records on file at the time of the hearing. Having examined such summary judgment evidence, and having heard the argument of counsel, the Court finds that the following uncontroverted facts exist:

1. That on January 1, 1985, the Honorable Rosario R. Veloso, Judge of the Regional Trial Court of the Republic of the Philippines, in Makati, Metro Manila, signed an Order in Cause No. Sp. Proc. No. M-130, styled "Nadina G. Maravilla, Petitioner v. Local Civil Registrar of Makati, Metro Manila, Respondent."

2. That a properly authenticated copy of said Order was attached to Movant's Second Motion for Partial Summary Judgment, through the Affidavit of Joseph S. Horrigan, attached to such Second Motion for Partial Summary Judgment.

3. That Armando C. Gustilo is the father of June Salvacion Gustilo.

4. That June Salvacion Gustilo is the daughter of Armando C. Gustilo, Deceased.

5. That any presumption that the biological father of June Salvacion Gustilo was Francisco J. Maravilla, Jr., was rebutted by the Order of the Philippine Court referred to above, dated January 7, 1985, which established the paternity of June Salvacion Gustilo by Armando C. Gustilo.

The Court is of the further opinion, and further finds that there is no genuine issue of material fact on the issue of whether June Salvacion Gustilo is a lawful heir of the Decedent, Armando C. Gustilo, and June Salvacion Gustilo, the moving party is entitled to judgment as a matter of law on such issue.

It is, therefore, ORDERED, ADJUDGED AND DECREED that at the trial of this cause, the findings of the Court, set forth above, are established as facts without the need of further formal proof.

It is further ORDERED, ADJUDGED AND DECREED that June Salvacion Gustilo, a Minor, be and she is hereby declared to be an heir of the Decedent, Armando C. Gustilo and, as a lawful heir, she is entitled to inherit from the Estate of Armando C. Gustilo, Deceased.

It is further ORDERED, ADJUDGED AND DECREED that the issue of the share and interest of June S. Gustilo in the real and personal property of such Decedent is hereby reserved for trial on the merits in this cause.

SIGNED this 8th day of June, 1993.

/s/ John Hutchison
JUDGE, PROBATE COURT NO. 1
OF HARRIS COUNTY, TEXAS

APPROVED AS TO FORM AND SUBSTANCE:

HORRIGAN & GOEHRS

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